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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1712

IN RE
GRAND JURY SUBPOENA SERVED UPON
SIMON HOROWITZ

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

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1. The Government in its opposition states to this Court that "the records subpoenaed have now been produced and now are in the hands of the Grand Jury." This representation is not correct since certain of the subpoenaed records are now impounded

and their disclosure to the Grand Jury depends on various factors, including, of course, the validity of the order appealed from.[1] Thus, Judge Pollack's order dated June 25, 1973, on remand, provides that documents which came into existence prior to January 1, 1966 need not be disclosed unless the Government makes a "minimal showing that, in light of other evidence that has been obtained, the documents may be relevant to the Grand Jury's investigation . . . ." (Appendix A, p. 2a, *infra.*) The order further provides that "all the papers shall remain impounded for such reasonable time as may be needed for completion of the Grand Jury's inquiry . . . ." Pursuant to the provisions of this order, counsel for both sides segregated out all records prior to January 1, 1964, pending a Government showing of relevance. See also Pet. Cert., pp. 13a-14a. Since these and other documents remain impounded by the Government and have not been turned over to the Grand Jury, the case of *United States* v. *Lyons,* 442 F.2d 1144 (C.A. 1, 1971) —relied on by the Government to show mootness—is inapplicable.[2] Indeed, under *United States* v. *Lyons*

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[1] We note, in any event, that if the suggestion of mootness were correct, the proper disposition of this case would be to grant the writ of certiorari, vacate the judgment below, and order further proceedings in light of the present status of the parties. *See United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950); Stern & Gressman, *Supreme Court Practice,* § 5.13 at p. 226 (4th ed. 1969).

[2] It is true, as the Government states in its brief in opposition, at page 2, that petitioners, in their application for a stay in this Court, at page 8 thereof, stated that: "Enforcement of the subpoenas will moot the petition." That statement, however, presumed full enforcement of the subpoenas requiring turnover of *all* documents; obviously, partial enforcement of the subpoenas cannot moot the petition.

itself, 442 F.2d 1145, as well as this Court's decision in *S.E.C.* v. *Medical Comm. for Human Rights,* 404 U.S. 403, 406-07 (1972) there is clearly the requisite continuing controversy over the Government's access to those documents not turned over to the Grand Jury to support this Court's jurisdiction.[3]

2. On the merits, the Government simply relies on the opinion below. This is, however, inconsistent with the Government's attempts to "factualize" this petition by characterizing it as seeking "review of the application by the Court of Appeals of the principles of *Couch* v. *United States,* 409 U.S. 322, to the facts of this case." Brief in Opp., p. 1. Judge Friendly squarely recognized that "the facts of this case" inescapably pose the central doctrinal issue underlying this Court's Fifth Amendment jurisprudence running from *Boyd* v. *United States,* 116 U.S. 630 (1886) through *Couch* v. *United States,* 409 U.S. 322 (1973) —*i.e.*, whether privacy is a constitutional policy protected by the Fifth, as well as the Fourth Amendment.

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[3] Regarding those documents that have been turned over to the Grand Jury, the Government has recently filed a motion under Rule 6(e), Fed. R. Crim. P., to permit "The Royal Canadian Mounted Police (RCMP) access to certain documents subpoenaed by the grand jury in order for the RCMP to assist the Grand Jury's investigation." Horowitz and petitioners have opposed this motion with affidavits and exhibits showing, *inter alia*, that the Manitoban authorities have: (a) previously acted illegally in the United States to get information to support *post hoc* the expropriation without compensation of the Forestry project in Manitoba, (b) undertaken arrangements with private American civil litigants suing respondents to utilize the Federal Rules of Civil Procedure to get compulsory discovery for the benefit of proceedings commenced by the Manitoban authorities. The court has indicated it will grant a protective order preventing dissemination of grand jury documents.

Judge Friendly's opinion squarely addresses that much debated question because "the facts of this case" compelled him to do so, and he holds simply and clearly that privacy is not a part of the Fifth Amendment. See Pet. Cert., pages 24a-26a. It is obvious from reading this Court's decision in *Couch* v. *United States, supra,* that this Court so structured its decision to reserve that crucial constitutional issue until presented with a record which appropriately demands its resolution. This is that record.

Illustrative of confusion in the lower courts on this constitutional issue is the Fifth Circuit's recent decision in *United States* v. *White,* 477 F.2d 757 (1973), wherein the Court held that under *Couch,* records given to a taxpayer's lawyer, pursuant to the attorney-client relationship with respect to an on going criminal tax investigation were not privileged on self-incrimination grounds because the requisite "personal compulsion" was lacking. The majority in *White* relied for its conclusion on the facts that the records were not owned by the taxpayer and were not turned over to the attorney by the taxpayer. 477 F.2d 757, 763; *see also* Judge Ainsworth's dissent at 477 F.2d 766. Under those criteria, the Fifth Circuit would have had to recognize the Fifth Amendment claim asserted here by petitioners. *White* thus illustrates the basic conflict in principle among the Second, Fifth, Seventh, and Ninth Circuits with regard to the fundamental privacy issue left open by this Court's ambiguous rationale in *Couch.* See Pet. for Cert., pp. 21-27. See also *United States* v. *Blank,* 459 F.2d 383, 386-87 (C.A. 6, 1972).

For the reasons stated, the case is not moot and the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

A Grand Jury Subpoena Duces Tecum Served upon Simon Horowitz, an Accountant.

ORDER

72 Misc. M-11-188

Upon the motion papers submitted by Herbert J. Miller, Esq., Counsel for Alexander Kasser and William Hundley, Esq., Counsel for Simon Horowitz, to quash a grand jury subpoena duces tecum served upon Simon Horowitz, an accountant, and upon the motion papers submitted in opposition by James Schreiber, Assistant United States Attorney;

Upon, the testimony given by Simon Horowitz, and an attorney named Joel Mallin, Esq., at a hearing held on March 21, 1973; and

Upon the decision of the Court of Appeals rendered June 8, 1973 affirming this court's decision in part and modifying said decision in part;

It Is Hereby Ordered that Simon Horowitz and Joel Mallin, Esq. forthwith turn over to the Grand Jury, the United States Attorney or any agent of the United States designated by the United States Attorney, the entire contents of the three file cabinets previously located at office No. 4, 248 Lorraine Avenue, Montclair, New Jersey, with the following limited exceptions:

a. The personal wills of Alexander and Elizabeth Kasser